

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARIA I. AMADOR</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONAL BEEF PACKING COMPANY</b>	)	Docket No. 1,037,021
Respondent	)	
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the May 8, 2012, Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Workers Compensation Board heard oral argument on November 16, 2012. Due to a conflict, Jeffrey King of Salina, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of Board Member Gary R. Terrill.

**APPEARANCES**

C. Albert Herdoiza and Thomas R. Fields of Kansas City, Kansas, appeared for claimant. Shirla R. McQueen of Liberal, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD**

The record consists of the transcript of the May 4, 2012, Hearing for Penalties and Sanctions and exhibits thereto, and the pleadings contained in the administrative file.

**ISSUES**

ALJ Fuller entered an Award in this claim on July 1, 2011. In the Award, the ALJ granted claimant a total of \$94,161.38 in temporary total and permanent partial disability benefits. Respondent appealed that Award to the Board, which affirmed the ALJ's Award

in its December 16, 2011, Order. Respondent then appealed the Board's Order to the Kansas Court of Appeals. A more detailed procedural history is set out below.

Claimant filed a Demand for Compensation on January 3, 2012, and a Motion for Sanctions on March 15, 2012. A hearing for penalties and sanctions was held on May 4, 2012. In a May 8, 2012, Order, ALJ Fuller found respondent and its insurance carrier's failure to pay was unintentional and awarded claimant penalties at \$10.00 per week for a total of \$60.00. The ALJ denied claimant's request for payment of attorney fees.

Claimant contends:

- The ALJ abused her discretion in failing to allow claimant's counsel to submit Claimant's Exhibit 4, a check stub for disability benefits in the amount of \$814.58.
- The ALJ erred in finding that claimant is not eligible for attorney fees.
- The ALJ erred in using K.S.A. 44-512a as the basis for denying attorney fees and completely disregarded, or was not cognizant of, the correct jurisdictional statute, K.S.A. 44-536.
- The ALJ abused her discretion in providing only \$10.00 per week in penalties based on the unsubstantiated belief that respondent and its insurance carrier's failure to pay permanent partial disability benefits on a timely basis was "unintentional."

Respondent contends that neither sanctions nor attorney fees are appropriate. Should the Board determine claimant is entitled to penalties, respondent requests this matter be remanded to the ALJ to hear testimony regarding the reasonableness of the attorney fees claimed.

The issues before the Board on this appeal are:

1. Is claimant entitled to penalties pursuant to K.S.A. 44-512a? Specifically, did claimant comply with that part of K.S.A. 44-512a(a) requiring a written demand to set forth with particularity the items of disability compensation claimed to be unpaid and past due?
2. Did ALJ Fuller err by sustaining respondent's objection to Claimant's Exhibit 4, a check stub for disability benefits in the amount of \$814.58?
3. If claimant is entitled to penalties, did ALJ Fuller err by providing only \$10.00 per week in penalties based on the unsubstantiated belief that respondent and its insurance carrier's failure to pay permanent partial disability benefits on a timely basis was "unintentional?"
4. Is claimant eligible for attorney fees pursuant to K.S.A. 44-512a or 44-536?

**FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

The following is a history of this claim:

- Claimant alleged she sustained neck and shoulder injuries resulting from a series of accidents from January 22, 2007, through October 2009, with an accident date of January 22, 2007. Respondent asserted claimant did not sustain a personal injury by accident arising out of and in the course of her employment. Also at issue was the nature and extent of claimant's disability, unauthorized medical treatment and future medical treatment.
- ALJ Fuller entered an Award in this claim on July 1, 2011. In the Award, the ALJ granted claimant an award of: 0.86 weeks of temporary total disability compensation at the rate of \$407.29 per week or \$350.27; followed by 53.95 weeks of permanent partial disability compensation at the rate of \$407.29 per week or \$21,973.30 for a 13% permanent partial impairment to the body as a whole; followed by 176.38 weeks of permanent partial disability compensation at the rate of \$407.29 per week or \$71,837.81 for a 55.5% work disability, making a total award of \$94,161.38.
- Respondent appealed ALJ Fuller's July 1, 2011, Award to the Board, which affirmed the ALJ's Award in its December 16, 2011, Order.
- Claimant filed a Demand for Compensation on January 3, 2012. The demand did not specify the dates and amounts of the disability payments that were unpaid or paid after they were due.
- On January 13, 2012, respondent appealed the Board's December 16, 2011, Order to the Kansas Court of Appeals.
- Respondent, also on January 13, 2012, issued claimant a check in the amount of \$5,877.19, which represented permanent partial disability payments for the 10 weeks preceding December 16, 2011, through January 15, 2012. The check was cashed by claimant's counsel on January 19, 2012.
- Respondent issued another check to claimant on February 24, 2012, in the amount of \$2,443.74, which represented permanent partial disability payments from January 16, 2012, through February 26, 2012. The check was cashed on March 1, 2012.
- Claimant filed a Motion for Sanctions on March 15, 2012. The demand did not specify the dates and amounts of the disability payments that were unpaid or paid after they were due.

- On May 4, 2012, a hearing for penalties and sanctions was held to consider claimant's motion for sanctions. Further discussion of that hearing is found below.
- In the May 8, 2012, Order, ALJ Fuller found respondent and its insurance carrier's failure to pay was unintentional and awarded claimant penalties at \$10.00 per week for a total of \$60.00. The ALJ denied claimant's request for payment of attorney fees.
- On May 15, 2012, claimant filed an Application for Review, appealing ALJ Fuller's May 8, 2012, Order to the Board.
- In an unpublished opinion filed on October 12, 2012, the Kansas Court of Appeals affirmed the Board's December 16, 2011, Order.
- On November 9, 2012, respondent filed a Petition for Review with the Kansas Supreme Court.

At the hearing for penalties and sanctions, claimant's attorney proffered that after the Board issued its Order on December 16, 2011, claimant filed a Demand for Compensation. Claimant introduced as exhibits return receipts from the U.S. Postal Service showing respondent's attorney and insurance carrier received the January 3, 2012, Demand for Compensation. At the hearing for penalties and sanctions, claimant demanded penalties and also requested attorney fees pursuant to K.S.A. 44-512a. Claimant's counsel was asked the statutory basis under K.S.A. 44-512a for attorney fees. His reply was as follows:

MR. FIELDS: States specifically in subsection, I guess it's (b) of 44-512(a) [*sic*]: "The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action." And I believe there is case law as well that says you're entitled to an hourly fee. It ranges anywhere from \$150 an hour up to \$250 an hour, I think. Judge Avery has ruled that \$250 was a reasonable hourly rate.<sup>1</sup>

Claimant's attorney did not indicate at the hearing for penalties and sanctions that K.S.A. 44-536(g) was being used as a basis for attorney fees. No witnesses testified at the hearing. Respondent, without an objection from claimant, introduced an affidavit signed by Anna Nunez, an insurance adjustor responsible for the claim. That affidavit states in part:

---

<sup>1</sup> P.S.H. Trans. at 6.

9. Due to an error in inputting data into the system, no further check was issued until 2/24/12 and was cashed on 3/1/12, at which time claimant's counsel cashed a check for all past-due payments.

10. The claimant's Motion for Sanctions was filed on 3/13/12, at which time there were no past-due or late payments.<sup>2</sup>

Claimant admitted that the late payments were not the fault of respondent or respondent's counsel and placed the blame on respondent's insurance carrier. Respondent argues that on the date claimant filed her Demand for Compensation, the time for appealing the Board's Order had not yet run. Respondent further argues that when the Board's Order was appealed to the Kansas Court of Appeals, claimant was due and owing 10 weeks of disability payments, and that amount had been paid. Respondent, on January 13, 2012, issued a check for \$5,877.19, which represented payments for the 10 weeks preceding December 16, 2011, through January 15, 2012. Respondent admits that due to an error in inputting data by respondent's insurance carrier, the six weeks of disability payments commencing January 16, 2012, were not paid until February 24, 2012. Respondent also contended that at no time did claimant state with particularity what benefits were unpaid and past due.

Claimant's attorney introduced Claimant's Exhibit 4, which was a check stub for disability benefits in the amount of \$814.58 that claimant received after filing her March 15, 2012, Motion for Sanctions. According to claimant, the check was one week overdue. Respondent objected on the grounds that the check was evidence of a new claim for sanctions. Respondent asserted claimant would have to "re-notice this up,"<sup>3</sup> as respondent had no idea claimant was making the late check an issue. ALJ Fuller sustained respondent's objection to Claimant's Exhibit 4.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

---

<sup>2</sup> *Id.*, Resp. Ex. 1 at 2.

<sup>3</sup> *Id.*, at 7.

K.S.A. 2006 Supp. 44-556(b) states:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

K.S.A. 44-512a in part states:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

Respondent was required to pay claimant 10 weeks of permanent partial disability payments in a lump sum on January 13, 2012, the date respondent appealed the Board's Order to the Kansas Court of Appeals. Claimant filed her Demand for Compensation on January 3, 2012, which was before the 10 weeks of permanent partial disability payments were due and owing. Claimant's Demand for Compensation contains no particulars concerning what disability payments were unpaid or past due. That is because on January 3, 2012, no disability compensation payments were unpaid or past due. Accordingly, the Board finds claimant's Demand for Compensation did not comply with the requirements of K.S.A. 44-512a(a) and, therefore, claimant is not entitled to any penalties.

Claimant asserts that respondent failed to timely pay six weeks of benefits commencing on January 16, 2012. Respondent issued a check for those six weeks of benefits on February 24, 2012. Claimant's January 3, 2012, Demand for Compensation was premature, as no disability payments were due and owing to claimant. Nor did the Demand for Compensation specify the payments that were due, but unpaid. The failure of respondent to timely pay the six weeks of disability benefits commencing January 16, 2012, cannot be considered a "[s]ubsequent [failure] to pay compensation" as set out in K.S.A. 44-512a(b). In essence, the failure of respondent to timely pay the six weeks of disability payments was its first failure to pay compensation that was past due.

In light of the Board's aforementioned findings, the issues of whether the ALJ erred by sustaining respondent's objection to Claimant's Exhibit 4 at the hearing for penalties and sanctions and not awarding claimant higher penalties are moot.

K.S.A. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

ALJ Fuller denied claimant's request for attorney fees and found that K.S.A. 44-512a(b) allows attorney fees in district court actions to collect past due disability and medical compensation. However, ALJ Fuller did not consider K.S.A. 44-536(g). That statute clearly states the director may authorize attorney fees to be paid by respondent when the services of an attorney are used by claimant in an unsuccessful attempt to gain additional compensation. Accordingly, the Board finds this claim shall be remanded to the ALJ to determine what, if any, attorney fees shall be awarded claimant.

**CONCLUSION**

1. Claimant is not entitled to penalties as she did not comply with that part of K.S.A. 44-512a(a) requiring a written demand to set forth with particularity the items of disability compensation claimed to be unpaid and past due.

2. The issues of whether the ALJ erred by sustaining respondent's objection to Claimant's Exhibit 4 at the hearing for penalties and sanctions and not awarding claimant higher penalties are moot.

3. Claimant may be awarded attorney fees pursuant to K.S.A. 44-536(g) and, therefore, this matter is remanded to the ALJ for a determination of what, if any, attorney fees are appropriate.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>4</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**WHEREFORE**, the Board modifies the May 8, 2012, Order entered by ALJ Fuller in accordance with the above findings and remands this matter to ALJ Fuller to determine what, if any, attorney fees shall be awarded claimant.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2013.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

---

<sup>4</sup> K.S.A. 2011 Supp. 44-555c(k).



c: C. Albert Herdoiza and Thomas R. Fields, Attorneys for Claimant  
albert7law@aol.com; tom@thomasrfields.com

Shirla R. McQueen and Kerry McQueen, Attorneys for Respondent and its  
Insurance Carrier  
smcqueen@sharpmcqueen.com; jdavis@sharpmcqueen.com

Pamela J. Fuller, Administrative Law Judge